

13/21/91

Q-11

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Complainant offers neither evidence nor explanation to support the circumstance level that it selected for Counts I, III, IV, V, and VI of the Complaint. Therefore, Respondent requests that the Complainant be compelled to provide more detailed information relating to the proposed civil penalty.

Complainant filed a Response to the Motion to Compel, contending that the information provided in Complainant's Prehearing Exchange and documents filed therewith effectively give the details of the basis for the proposed penalty. In defending the adequacy of its Prehearing Exchange, Complainant asserts that the Penalty Calculation Worksheet lists the level and extent categories and constitutes a detailed explanation of how the specific penalty policy applies to each and every Count of the Complaint. Complainant further contends that the circumstance level for Counts II-VI, incorrectly listed as three (3) on the reverse side of the worksheet, is a mere typographical error of minor consequence because the face of the worksheet and the amount of the penalties assessed in the Complaint make it clear that Complainant has assessed a Level 1 penalty for counts II-VI. Therefore, Complainant requests that Respondent's motion be denied.

Respondent's argument that Complainant's Prehearing Exchange is generally deficient in the manner in which it sets out the basis for the proposed civil penalty is not persuasive. The Order Setting Prehearing Procedures provides in part:

2. Complainant shall set out how the proposed penalty was determined, and shall state in detail how the specific provisions of any EPA penalty or enforcement policies and/or guidelines were used in calculating the penalty.

Respondent's argument is unpersuasive because it focuses exclusively on the content of the Penalty Calculation Worksheet and Civil Penalty Computation, independent of each other and the numerous other documents submitted by Complainant. When read together, it is apparent that the Penalty Calculation Worksheet (Complainant's Exhibit No. 11), Enforcement Response Policy for Test Rules Under Section 4 of the TSCA (Complainant's Exhibit No. 12), TSCA Good Laboratory Practices Regulations Enforcement Policy (Complainant's Exhibit No. 13), Guidelines for Assessment of Civil Penalties Under Section 16 of the TSCA (Complainant's Exhibit No. 14), and Civil Penalty Computation (Complainant's Unnumbered Exhibit) provide Respondent with an abundance of information on how the Complainant arrived at the figure for the proposed civil penalty. While Respondent correctly notes several errors in the Prehearing Exchange provided by Complainant, the submissions substantially comply with the above quoted paragraph 2 of the Order Setting Prehearing Procedures. A discussion on the individual arguments Respondent raised and the merits thereof follows.

Respondent's first objection to the Prehearing Exchange is that Complainant's Exhibit No. 11 is a table that identifies no specific provision (or page number) of any EPA penalty or enforcement policy and does not compare the violations alleged in

the Complaint with the examples provided in the EPA penalty policies. Although the Penalty Calculation Worksheet supplied by Complainant neglects to cite explicitly the relevant provisions and parts contained therein by number, the terminology and classification methods utilized in the worksheet are easily cross referenced with the copies of the EPA penalty policies and guidelines supplied to Respondent. Indeed, the worksheet itself contains "notice," "extent," and "circumstance level" column headings, beneath each of which is included the applicable violation level alleged by Complainant for each count of the Complaint. Therefore, Respondent's argument is not well taken on this point.

Respondent next asserts that Complainant's Exhibit No. 11 contains no description of any facts that Complainant believes to be significant or explanation of how the penalty policies should be applied to the facts in this case. While Respondent's observations regarding the factual content of the worksheet is essentially correct, paragraph 2 of the Order Setting Prehearing Procedures does not require Complainant to make such a showing. The information contained in the Complaint and documents submitted therewith need not be fully duplicated in the Prehearing Exchange. In as much as the facts which gave rise to the filing of the Complaint and the civil penalty proposed by EPA are set out in detail in the Complaint itself, Respondent's position on this issue is rejected.

Respondent also contends that the Civil Penalty Computation submitted by Complainant, barely addresses the key issue at dispute regarding the appropriate penalty circumstance level and that the Complainant offers neither evidence nor explanation to support the Circumstance Level that it selected for Counts I, III, IV, V, and VI of the Complaint. Respondent's argument again is unpersuasive when the supposedly deficient document is viewed together with the remainder of Complainant's prehearing submission. The circumstance level listed for each count and the matrix system in which they operate is adequately set out in the copies of the EPA penalty policies and guidelines supplied to the Respondent. Although the brief description of each circumstance level contained for Counts II-VI is listed incorrectly on the reverse side of Exhibit No. 11, as discussed in the preceding analysis, Respondent otherwise has been supplied with a sufficient amount of information to challenge the circumstance levels chosen by EPA. Thus, the Motion to Compel Compliance in the form of more specific statement relating to the Circumstance Levels for Counts II-VI will be denied.

Moreover, Respondent's motion to compel is moot insofar as it seeks a corrected Penalty Calculation Worksheet since Complainant is being permitted, infra, to submit a new Exhibit No. 11.

II. Motion to Accept Respondent's Late Prehearing Exchange

The Respondent filed a motion to accept its Prehearing Exchange four days late. This late filing was due to

inadvertence and the motion to accept is unopposed. Accordingly, Respondent's motion to accept the late filed Prehearing Exchange is granted and the Respondent's Prehearing Exchange is accepted.

III. Respondent's Motion to Supplement and Complainant's Motion to Amend Prehearing Exchange

Respondent filed a motion to supplement the Prehearing Exchange by adding an Exhibit No. 29 to correct complainant's Exhibit No. 7 which was allegedly erroneously submitted as a copy of Respondent's final test protocol.

Complainant filed a reply to the Respondent's motion to supplement in which Complainant does not oppose Respondent's request to add Exhibit No. 29, but in which Complainant seeks to substitute a new Exhibit No. 7, which new exhibit is allegedly the final protocol. Complainant admits that the original Exhibit No. 7 was an earlier version of the protocol but avers that Respondent's Exhibit No. 29 is likewise not the final version of the protocol. Complainant, therefore, seeks to amend the Prehearing Exchange to file the new Exhibit No. 7. In addition, the Complainant seeks to amend its Prehearing Exchange by submitting a new Exhibit No. 11 which, as noted above, contains various errors. No response to Complainant's motion to amend to add new Exhibits Nos. 7 and 11 was received from the Respondent.

In light of the above, Respondent's motion to supplement the record to add Exhibit No. 29 is granted, as is Complainant's motion to amend the prehearing exchange to add new Exhibit Nos. 7 and 11.

IV. Motion to Amend the Complaint and Related Motions.


Complainant filed a Motion to Amend the Complaint together with a proposed First Amended Complaint. Respondent filed an Answer to the Amended Complaint, and also submitted several motions with regard thereto, including a motion seeking a supplemental prehearing exchange and a motion requesting Complainant to reveal the basis for the additional penalties sought in the Amended Complaint. Since Respondent has not presented any opposition to Complainant's motion to amend and has filed an answer to the amended complaint, the motion to amend is granted.

Similarly, Complainant filed no opposition to Respondent's motion for a Supplemental Prehearing Exchange. Therefore, that motion is granted and a Supplemental Prehearing Exchange shall be filed by the parties by November 25, 1991. Replies to the Supplemental Prehearing Exchange are to be submitted by November 16, 1991. This Supplemental Prehearing Exchange shall comply with the requirements of the original Order Setting Prehearing Procedures.

However, Respondent's motion that Complainant reveal the basis for the additional penalties sought in the Amended Complaint must be denied as premature since a Supplemental Prehearing Exchange is being ordered. That motion, therefore, is

denied without prejudice to its being renewed after the
Supplemental Prehearing Exchange.

SO ORDERED.


Daniel M. Head
Administrative Law Judge

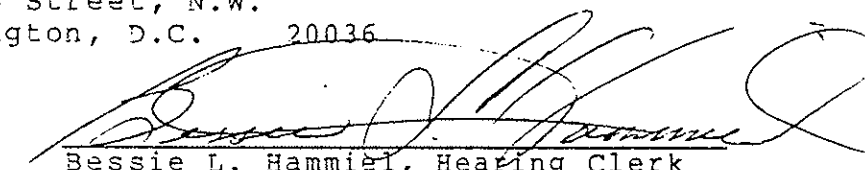
Dated: October 21, 1991
Washington, D.C.

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Order Disposing of Outstanding Motions and Setting Further Procedures was filed in re Sandoz Chemicals Corporation; Docket No. TSCA 90-H-12 and copies of the same were mailed to the following as indicated below:

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Dated: October 21, 1991